

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

APPEAL NO.55 OF 1997
IN
S.C.SUIT NO.344 OF 1997

1. Taiyebji Essofbhoy Bengaliwala,
of Bombay, Indian Inhabitant
carrying on business in the firm
name and style of M/s.A.G.Bengaliwala
& Co., as a Sole Proprietor thereof
at 35, Tamarind Lane, Fort,
Mumbai 400 001 since deceased by
his heirs:

1a. Habil Tayebji Bengaliwala,
son of Taiyebji E.Bengaliwala
of Bombay Indian Inhabitant,
residing at 5th floor, 37,
Jijibhai Dadabhai Lane, Fort,
Mumbai-400 001.

1b. Vazira T. Bengaliwala, aged 75.

1c. Kaniza Tayebji Bengaliwala, aged 53.

1d. Nafisa Tayebji Bengaliwala, aged 51

Nos.1bm 1c abd 1d Bombay Indian
Inhabitants residing at House No.
4/340 B, Ground floor, Begumpura
Haiderali Casumji Street, Surat-
395 003 and

1e. Mrs.Sena Saifuddin Rangwala,
daughter of Taiyebji E. Bengaliwala,
aged 55 of Bombay Indian Inhabitant,
residing at Karishma B/18, Off
Link Road, Borivali (West),
Bombay-400 091 being the legal
heirs and representatives of
the Plaintiff abovenamed.

.. Appellants
(Orig.Plaintiffs.)

v/s.

1. Economic Traders, a partnership
Firm, carrying on business at
235, Annie Besant Road, Worli,
Bombay-400 010.

2. Kasim Taiyebji Bengali,
having his address at C/o.M/s.
M.Darukhanawala Corpn., 237,

Nagdevi Street, Bombay-400 003... Respondents

(Orig.Defendants)

Mr.Behram Shroff with Mr.F.T.Zaidy and Ms. Bhatia
i/by M/s. Zaidy & Co. for appellants.

Mr.Chetan Kapadia i/by Mr.S.G.Lakhani for
respondent No.1.

CORAM : R.M.LODHA AND
J.P.DEVADHAR, JJ.

DATED : 14th September, 2004

ORAL JUDGMENT (Per R.M.Lodha, J.)

Heard the learned counsel for the parties.

2. The learned trial Judge of this court has recorded the finding that the agreements dated 14.1.1964, 27.7.1968, 1.7.1972 and 13.1.1977 created and conferred leave and licence in favour of the defendants in respect of the suit premises and that this court has no jurisdiction to entertain and try the suit.

3. The learned counsel for the appellants (legal heirs of the original plaintiff) in the light of the said finding recorded by the learned trial Judge and also the submission of the learned counsel for the respondent No.1 (original defendant) that the said finding shall operate as an issue estoppel between the parties if the suit on the basis of that finding is tried by the Small Causes Court, prays for return of the plaint for

presentation in the court of competent jurisdiction

i.e. court of Small Causes at Bombay.

4. We record that the learned counsel for the respondent No.1 (original defendant) specifically submitted before us that the finding recorded by the learned trial Judge that the subject agreements are in fact agreements for leave and licence binds the first respondent. In view thereof, we find that the prayer made by the counsel for the appellants (legal heirs of the original plaintiff) for return of the plaint is justified.

4. We, accordingly, dispose of the appeal by the following order:-

(i) The finding of the learned trial Judge that the subject agreements dated 14.1.1964, 27.7.1968, 1.7.1972 and 13.1.1977 are leave and licence agreements, is maintained and the said finding shall bind both the parties.

(ii) All other findings of the learned trial Judge in the judgment dated 6th December, 1996 are set aside.

(iii) The plaint is ordered to be returned

to the appellants (legal heirs of the original plaintiff) for presentation to the competent court i.e. Small Causes Court, Mumbai.

(iv) The appellants (legal heirs of the original plaintiff) shall be at liberty to amend the plaint adequately and properly in the light of the finding binding between the parties that the subject agreements are the agreements for leave and licence.

(v) The question whether the respondent No.1 (the defendant) is the protected licensee or not under section 15A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 is kept open to be decided in the suit by the Small Causes Court.

(vi) The interim order dated 19.2.1997 is ordered to remain operative for a period of six months to enable the appellants to apply for an appropriate interim order from the Small Causes Court after presentation of the plaint.

(vii) Liberty to any of the parties to apply to the Small Causes Court for hearing and deciding the suit alongwith Rent and Declaratory Suit No.5431 of 1980.

(viii) Hearing of the suit is expedited by the Small Causes Court.

ix) The parties are at liberty to withdraw the documents exhibited in the evidence from the registry.

No costs.

(R.M.LODHA, J.)

(J.P. DEVADHAR, J.)